



April 23, 2001

Ms. Anne M. Constantine  
Legal Counsel  
D/FW International Airport  
P.O. Drawer 619428  
DFW Airport, Texas 75261-9428

OR2001-1589

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146285.

The Dallas/Fort Worth International Airport Board (the "board") received a request for all documents related to the bid submitted by Daimler Chrysler Rail Systems (North America), Inc. d/b/a Adtranz Automated Transit Systems ("Adtranz") pertaining to an automated people mover system, including all correspondence between Adtranz and the Airport Development Department. You submitted responsive information to this office consisting of documents marked as Exhibit B and correspondence between Adtranz and the Airport Development Department. You also notified Adtranz of the request in accordance with section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Adtranz subsequently responded by submitting to us the same documents you forwarded to us as Exhibit B. Adtranz asserts that the responsive information is excepted from disclosure by sections 552.101 and 552.110 of the Government Code. You make no arguments in support of these exceptions. We have considered the claimed exceptions and have reviewed the submitted information.

First, we note that neither you nor Adtranz provided any reasons why the correspondence submitted to us should be excepted from disclosure under sections 552.101 and 552.110 of the Government Code. Therefore, we conclude that the submitted correspondence is public information that must be released to the requestor pursuant to section 552.021 of the Government Code. However, some of the information within the correspondence is also located in Exhibit B. We have marked this information for your review. To the extent that any exceptions to disclosure apply to the information located in Exhibit B, they also apply to the Exhibit B information located within the submitted correspondence.

Next, we note that you did not comply with the procedural requirements of section 552.301(e) of the Government Code in dealing with this request for information. Section 552.301(e) in part requires a governmental body to submit to this office within fifteen business days of receiving an open records request:

- (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

Gov't Code § 552.301(e)(4). You did not forward Exhibit B to our office within fifteen business days of receiving the request for information. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information that overcomes this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); *see also* Open Records Decision No. 319 (1982). A demonstration that the requested information is deemed confidential by law or implicates a third party's interest is a compelling interest sufficient to negate this presumption. *See* Open Records Decision No. 150 (1977). As you raise section 552.110 of the Government Code as an exception to disclosure of Exhibit B, we will address your claim.<sup>1</sup>

We note that some of the information in Exhibit B was previously addressed in Open Records Letter No. 2000-4716 (2000). To the extent that the information in Exhibit B is precisely the same information that was addressed in Open Records Letter No. 2000-4716,

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<sup>1</sup> We understand that Exhibit B is an attachment that is incorporated by reference into contract number 8500113. Contract number 8500113 was the subject of a prior request for information. *See* Open Records Letter No. 2001-0601 (2001). We note that we did not receive Exhibit B within the fifteen day deadline for that request for information, either. However, the compelling interest that exists for negating the presumption that Exhibit B is now public for the present request is the same compelling interest that would exist for negating the presumption that Exhibit B would have been public for the request concerning the contract information.

the board may rely on that letter ruling as a previous determination regarding the submitted information. *See* Open Records Decision No. 673 (2001) (previous determination exists where requested information is precisely same information addressed in prior attorney general ruling, ruling is addressed to same governmental body, ruling concludes that information is or is not excepted from disclosure, and law, facts, and circumstances on which ruling was based have not changed).

We now address the submitted information in Exhibit B that is not encompassed by the previous determination in Open Records Letter No. 2000-4716. Adtranz argues that the information in Exhibit B should be excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) certain commercial or financial information. *See* Gov't Code § 552.110(a),(b). Among other arguments, Adtranz asserts that the information in Exhibit B constitutes trade secret information. A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;

- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). Whether particular information is a trade secret is a determination of fact. *See* Open Records Decision No. 552 at 2 (1990). In the open records ruling process, this office is unable to resolve disputes of fact regarding the status of information as “trade secrets” and must rely only upon the facts alleged or the facts that are discernible from the information at issue. Accordingly, this office will accept a claim that information is a “trade secret” when a *prima facie* case has been made to that effect and no argument is made that rebuts that assertion as a matter of law. *Id.* at 5. Upon careful review of Adtranz’s arguments and the submitted information, we believe Adtranz has established that the so-called System Documents constitute trade secret information.

Adtranz also asserts that the System Documents, as well as the so-called Financial Statements and Organizational Documents, are confidential commercial or financial information. Section 552.110(b) excepts from disclosure “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained...” Gov’t Code § 552.110(b). Upon careful review of Adtranz’s arguments and the submitted information, we believe Adtranz has demonstrated through specific factual assertions that it actually faces competition and that it would likely suffer substantial competitive harm if the information at issue were to be released to the public. Therefore, we conclude that the board must withhold the information in Exhibit B from disclosure pursuant to section 552.110(b) of the Government Code. Because our ruling is based on section 552.110, we need not address the applicability of section 552.101 of the Government Code to the submitted information.

In summary, you must release the submitted correspondence to the requestor, except for the marked documents, pursuant to section 552.021 of the Government Code. To the extent that the information in Exhibit B is precisely the same information that was addressed in Open Records Letter No. 2000-4716, the board may rely on that letter ruling as a previous determination regarding the submitted information. The board must withhold from disclosure the System Documents as confidential trade secrets pursuant to section 552.110(a) of the Government Code. The board must also withhold from disclosure the System Documents, as well as the Financial Statements and Organizational Documents, as confidential commercial or financial information pursuant to section 552.110(b) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay. H. Hastings  
Assistant Attorney General  
Open Records Division

KHH/RJB/seg

Ref: ID# 146285

Encl. Marked documents

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